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No. 511

Supreme Court of the United States

OCTOBER TERM, 1969

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONER

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I

The Board says that the principal question presented by petitioner Prudential is not presented on the record. There is no substance to this assertion.

The principal question is whether an employer can be made to provide an incumbent union with a list of the home addresses of nonmembers of the union in

order to assist the union to expand its membership and thus enhance its bargaining power.

Prudential maintained throughout the proceeding that the Union wanted the list of addresses so that it could solicit the nonmembers on the list for membership. The Board "did not dispute the fact" that the list might be used for recruiting. The Court of Appeals was unconcerned that the list would be so used. (Pet. App. 9a n.11, 29a).

The professed purpose of the Union in seeking the list was to communicate with employees about contract negotiations and contract administration, Prudential proposed that, at the very least, the Board's order be limited in such a way that the list could be used only for communications about contract negotiation and contract administration. The court rejected the proposal, and, Judge Friendly, dissenting below, referred to "the out-of-hand rejection by the Board and the Union" of Prudential's suggestion. He would have remanded the case to obtain an explanation from the Board "why an order limited as Prudential suggests would not meet any legitimate union needs." (Pet. App. 33a-34a).

The court below has thus granted enforcement of a Board order that compels an employer to turn over to an incumbent union names and addresses of nonmembers of the union that can and likely will be used to solicit their membership. It has done so even though it was urged to render a judgment that would not have compelled this result.

The case is thus no different from, for example, a case of wrongful death in which judgment was for $10,000 for loss of expectancy and $5,000 for pain and

suffering and an intermediate appellate court, saying it was immaterial that damages for pain and suffering were included, declined to reduce the judgment to $10,000. In such a case, there can be no doubt that the intermediate appellate court's judgment would pose for the highest appellate court the question whether the law allowed recovery for pain and suffering in a wrongful death case. By the same token, it cannot be denied that there is presented in this case the important, novel question whether an employer can be required to help an employee organization in the way in which Prudential has been ordered by the Board and the Court of Appeals to help the Union.

II

The question is both novel and important. It is no answer to say, as the court below said in language now quoted by the Board, that "there is no clear distinction between informing non-member agents about the benefits . . . [a union] has obtained and hopes in the future to secure for them and its solicitation of their support." (Pet. App. 29a; NLRB Br. in Opp. 9-10). Prudential's objection is not that in communications between the Union and nonmembers of the Union about contract negotiations and administration the Union might engage in some puffing so that the communications might have an incidental effect upon the nonmembers' attitude toward the Union. Bearing in mind that in the past the Union has not communicated about contract matters with its members or the nonmembers whose addresses it has, Prudential is concerned over the use of the list for out-and-out recruitment of new members. Surely such use of the list would not be beyond perception.

There is no decision of this Court or of any court of appeals under which an employer is required to turn over to a union a nonmember employee address list for that purpose. The question should be resolved by this Court.

Respectfully submitted,

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